
Henry Steele Commager

A Constitution for All the People

By June 26, 1787, tempers in the Federal Convention were already growing short, for gentlemen had come to the explosive question of representation in the upper chamber. Two days later Franklin moved to invoke divine guidance, and his motion was shunted aside only because there was no money with which to pay a chaplain and the members were unprepared to appeal to Heaven without an intermediary. It was not surprising that when James Madison spoke to the question of representation in the proposed legislature, he was conscious of the solemnity of the occasion. We are, he said, framing a system "which we wish to last for ages" and one that might "decide forever the fate of Republican Government."

It was an awful thought, and when, a few days later, Gouverneur Morris spoke to the same subject he felt the occasion a most solemn one: even the irrepressible Morris could be solemn. "He came here," he observed (so Madison noted),

as a Representative of America; he flattered himself he came here in some degree as a Representative of the whole human race: for the whole human race will be affected by the proceedings of this Convention. He wished gentlemen to extend their views beyond the present moment of time: beyond the narrow limits . . . from which they derive their political origin. . . .

Much has been said of the sentiments of the people. They were unknown. They could not be known. All that we can infer is that if the plan we recommend be reasonable & right: all who have reasonable minds and sound intentions will embrace it

These were by no means occasional sentiments only. They were senti-

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ments that occurred again and again throughout the whole of that long hot summer, until they received their final, eloquent expression from the aged Franklin in that comment on the rising, not the setting, sun. Even during the most acrimonious debates members were aware that they were framing a constitution for ages to come, that they were creating a model for people everywhere on the globe; there was a lively sense of responsibility and even of destiny. Nor can we now, as we contemplate that Constitution which is the oldest written national constitution, and that federal system which is one of the oldest and the most successful in history, regard these appeals to posterity as merely rhetorical.

That men are not always conscious either of what they do or of the motives that animate them is a familiar rather than a cynical observation. Some 45 years ago Charles A. Beard propounded an economic interpretation of the Constitution—an interpretation which submitted that the Constitution was essentially (that is a crucial word) an economic document—and that it was carried through the Convention and the state ratifying conventions by interested economic groups for economic reasons. "The Constitution," Mr. Beard concluded, "was essentially an economic document based upon the concept that the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities."

At the time it was pronounced, that interpretation caused something of a sensation, and Mr. Beard was himself eventually to comment with justifiable indignation on the meanness and the vehemence of the attacks upon it—and him. Yet the remarkable thing about the economic interpretation is not the criticism it inspired but the support it commanded. For within a few years it had established itself as the new orthodoxy, and those who took exception to it were stamped either as professional patriots—perhaps secret Sons or Daughters of the Revolution—or naïve academicians who had never learned the facts of economic life.

The attraction that the economic interpretation had for the generation of the twenties and thirties—and that it still exerts even into the fifties—is one of the curiosities of our cultural history, but it is by no means an inexplicable one. To a generation of materialists Beard's thesis made clear that the stuff of history was material. To a generation disillusioned by the exploitations of big business it discovered that the past, too, had been ravaged by economic exploiters. To a generation that looked with skeptical eyes upon the claims of Wilsonian idealism and all but rejoiced in their frustration, it suggested that all earlier idealisms and patriotisms—even the idealism and patriotism of the framers—had been similarly flawed by selfishness and hypocrisy.

Yet may it not be said of *An Economic Interpretation of the Constitution* that it is not a conclusion but a point of departure? It explains a great deal about the forces that went into the making of the Constitution, and a great deal, too, about the men who assembled in Philadelphia in 1787, but it

tells us extraordinarily little about the document itself. And it tells us even less about the historical meaning of that document.

What were the objects of the Federal Convention? The immediate objects were to restore order; to strengthen the public credit; to enable the United States to make satisfactory commercial treaties and agreements; to provide conditions in which trade and commerce could flourish; to facilitate management of the western lands and of Indian affairs. All familiar enough. But what, in the light of history, were the grand objects of the Convention? What was it that gave Madison and Morris and Wilson and King and Washington himself a sense of destiny?

There were two grand objects—objects inextricably interrelated. The first was to solve the problem of federalism, that is, the problem of the distribution of powers among governments. Upon the wisdom with which members of the Convention distinguished between powers of a general and powers of a local nature, and assigned these to their appropriate governments, would depend the success or failure of the new experiment.

But it was impossible for the children of the eighteenth century to talk or think of powers without thinking of power, and this was a healthy realism. No less troublesome—and more fundamental—than the problem of the distribution of powers, was the problem of sanctions. How were they to enforce the terms of the distribution and impose limits upon all the governments involved? It was one thing to work out the most ideal distribution of general and local powers. It was another thing to see to it that the states abided by their obligations under the Articles of Union and that the national government respected the autonomy of the states and the liberty of individuals.

Those familiar with the Revolutionary era know that the second of these problems was more difficult than the first. Americans had, indeed, learned how to limit government: the written constitutions, the bills of rights, the checks and balances, and so forth. They had not yet learned (nor had anyone) how to “substitute the mild magistracy of the law for the cruel and violent magistracy of force.” The phrase is Madison’s.

Let us return to the *Economic Interpretation*. The correctness of Beard’s analysis of the origins and backgrounds of the membership of the Convention, of the arguments in the Convention, and of the methods of assuring ratification, need not be debated. But these considerations are, in a sense, irrelevant and immaterial. For though they are designed to illuminate the document itself, in fact they illuminate only the processes of its manufacture.

The idea that property considerations were paramount in the minds of those assembled in Philadelphia is misleading and unsound and is borne out neither by the evidence of the debates in the Convention nor by the Constitution itself. The Constitution was not essentially an economic document. It was, and is, essentially a political document. It addresses itself to the great

and fundamental question of the distribution of powers between governments. The Constitution was—and is—a document that attempts to provide sanctions behind that distribution; a document that sets up, through law, a standing rule to live by and provides legal machinery for the enforcement of that rule. These are political, not economic functions.

Not only were the principles that animated the framers political rather than economic; the solutions that they formulated to the great questions that confronted them were dictated by political, not by economic considerations.

Here are two fundamental challenges to the Beard interpretation: first, the Constitution is primarily a document in federalism; and second, the Constitution does not in fact confess or display the controlling influence of those who held that "the fundamental private rights of property are anterior to government and morally beyond the reach of popular majorities."

Let us look more closely at these two contentions. The first requires little elaboration or vindication, for it is clear to all students of the Revolutionary era that the one pervasive and overbranching problem of that generation was the problem of imperial organization. How to get the various parts of any empire to work together for common purposes? How to get central control—over war, for example, or commerce or money—without impairing local autonomy? How, on the other hand, to preserve personal liberty and local self-government without impairing the effectiveness of the central government? This was one of the oldest problems in political science, and it is one of the freshest—as old as the history of the Greek city-states; as new as the recent debate over Federal aid to education or the Bricker amendment.

The British failed to solve the problem of imperial order; when pushed to the wall they had recourse to the hopelessly doctrinaire Declaratory Act, which was, in fact, a declaration of political bankruptcy; as Edmund Burke observed, no people is going to be argued into slavery. The Americans then took up the vexatious problem. The Articles of Confederation were satisfactory enough as far as the distribution of powers was concerned, but wholly wanting in sanctions. The absence of sanctions spelled the failure of the Articles—and this failure led to the Philadelphia Convention.

Now it will be readily conceded that many, if not most, of the questions connected with federalism were economic in character. Involved were such practical matters as taxation, the regulation of commerce, coinage, western lands, slavery, and so forth. Yet the problem that presented itself to the framers was not whether government should exercise authority over such matters as these; it was *which* government should exercise such authority—and how should it be exercised?

There were, after all, no anarchists at the Federal Convention. Everyone agreed that some government had to have authority to tax, raise armies, regulate commerce, coin money, control contracts, enact bankruptcy legisla-

tion, regulate western territories, make treaties, and do all the things that government must do. But where should these authorities be lodged—with the state governments or with the national government they were about to erect, or with both?

This question was a political, not an economic, one. And the solution at which the framers arrived was based upon a sound understanding of politics, and need not be explained by reference to class attachments or security interests.

Certainly if the framers were concerned primarily or even largely with protecting property against popular majorities, they failed signally to carry out their purposes. It is at this point in our consideration of the *Economic Interpretation of the Constitution* that we need to employ what our literary friends call *explication du texte*. For the weakest link in the Beard interpretation is precisely the crucial one—the document itself. Mr. Beard makes amply clear that those who wrote the Constitution were members of the propertied classes, and that many of them were personally involved in the outcome of what they were about to do; he makes out a persuasive case that the division over the Constitution was along economic lines. What he does not make clear is how or where the Constitution itself reflects all these economic influences.

Much is made of the contract clause and the paper money clause of the Constitution. No state may impair the obligations of a contract—whatever those words mean, and they apparently did not mean to the framers quite what Chief Justice Marshall later said they meant in *Fletcher v. Peck* or *Dartmouth College v. Woodward*. No state may emit bills of credit or make anything but gold and silver coin legal tender in payment of debts.

These are formidable prohibitions, and clearly reflect the impatience of men of property with the malpractices of the states during the Confederation. Yet quite aside from what the states may or may not have done, who can doubt that these limitations upon the states followed a sound principle—the principle that control of coinage and money belonged to the central, not the local governments, and the principle that local jurisdictions should not be able to modify or overthrow contracts recognized throughout the Union?

What is most interesting in this connection is what is so often overlooked; that the framers did not write any comparable prohibitions upon the United States government. The United States was not forbidden to impair the obligation of its contracts, not at least in the Constitution as it came from the hands of its property-conscious framers. Possibly the Fifth Amendment may have squinted toward such a prohibition; we need not determine that now, for the Fifth Amendment was added by the states after the Constitution had been ratified. So, too, the emission of bills of credit and the making of other than gold and silver legal tender were limitations on the states, but not on the national government. There was, in fact, a lively debate over

the question of limiting the authority of the national government in the matter of bills of credit. When the question came up on August 16, Gouverneur Morris threatened that "The Monied interest will oppose the plan of Government, if paper emissions be not prohibited." In the end the Convention dropped out a specific authorization to emit bills of credit, but pointedly did not prohibit such action. Just where this left the situation troubled Chief Justice Chase's Court briefly three-quarters of a century later; the Court recovered its balance, and the sovereign power of the government over money was not again successfully challenged.

Nor were there other specific limitations of an economic character upon the powers of the new government that was being erected on the ruins of the old. The framers properly gave the Congress power to regulate commerce with foreign nations and among the states. The term commerce—as Hamilton and Adair (and Crosskey, too!) have made clear—was broadly meant, and the grant of authority, too, was broad. The framers gave Congress the power to levy taxes and, again, wrote no limitations into the Constitution except as to the apportionment of direct taxes; it remained for the most conservative of Courts to reverse itself, and common sense, and discover that the framers had intended to forbid an income tax! Today, organizations that invoke the very term "constitutional" are agitating for an amendment placing a quantitative limit upon income taxes that may be levied; fortunately, Madison's generation understood better the true nature of governmental power.

The framers gave Congress—in ambiguous terms, to be sure—authority to make "all needful Rules and Regulations respecting the Territory or other Property" of the United States, and provided that "new states may be admitted." These evasive phrases gave little hint of the heated debates in the Convention over western lands. Those who delight to find narrow and undemocratic sentiments in the breasts of the framers never cease to quote a Gouverneur Morris or an Elbridge Gerry on the dangers of the West, and it is possible to compile a horrid catalogue of such statements. But what is significant is not what framers said, but what they did. They did not place any limits upon the disposition of western territory, or establish any barriers against the admission of western states.

The fact is that we look in vain in the *Constitution itself* for any really effective guarantee for property or any effective barriers against what Beard calls "the reach of popular majorities."

It will be argued, however, that what the framers feared was the states, and that the specific prohibitions against state action, together with the broad transfer of economic powers from state to nation, were deemed sufficient guarantee against state attacks upon property. As for the national government, care was taken to make that sufficiently aristocratic, sufficiently

the representative of the propertied classes, and sufficiently checked and limited so that it would not threaten basic property interests.

It is at this juncture that the familiar principle of limitation on governmental authority commands our attention. Granted the wisest distribution of powers among governments, what guarantee was there that power would be properly exercised? What guarantees were there against the abuse of power? What assurance was there that the large states would not ride roughshod over the small, that majorities would not crush minorities or minorities abuse majorities? What protection was there against mobs, demagogues, dangerous combinations of interests or of states? What protection was there for the commercial interest, the planter interest, the slave interest, the securities interests, the land speculator interests?

It was Madison who most clearly saw the real character of this problem and who formulated its solution. It was not that the people as such were dangerous; "The truth was," he said on July 11, "that all men having power ought to be distrusted to a certain degree." Long before Lord Acton coined the aphorism, the Revolutionary leaders had discovered that power corrupts. They understood, too, the drive for power on the part of individuals and groups. All this is familiar to students of *The Federalist*, No. 10. It should be familiar to students of the debates in Philadelphia, for there, too, Madison set forth his theory and supported it with a wealth of argument. Listen to him on one of the early days of the Convention, June 6, when he is discussing the way to avoid abuses of republican liberty—abuses which "prevailed in the largest as well as the smallest [states] . . ."

. . . And were we not thence admonished [he continued] to enlarge the sphere as far as the nature of the Government would admit. This was the only defence against the inconveniences of democracy consistent with the democratic form of Government [our emphasis]. All civilized Societies would be divided into different Sects. Factions & interests, as they happened to consist of rich & poor, debtors and creditors, the landed, the manufacturing, the commercial interests, the inhabitants of this district or that district, the followers of this political leader or that political leader, the disciples of this religious Sect or that religious Sect. In all cases where a majority are united by a common interest or passion, the rights of the minority are in danger. . . . In a Republican Govt. the Majority if united have always an opportunity [to oppress the minority. What is the remedy?] The only remedy is to enlarge the sphere, & thereby divide the community into so great a number of interests & parties, that in the first place a majority will not be likely at the same moment to have a common interest separate from that of the whole or of the minority; and in the second place, that in case they should have such an interest, they may not be apt to unite in the pursuit of it. It was incumbent on us then to try this remedy, and . . . to frame a republican system on such a scale & in such a form as will controul all the evils which have been experienced.

This long quotation is wonderfully eloquent of the attitude of the most

magacious of the framers. Madison, Wilson, Mason, Franklin, as well as Gerry, Morris, Pinckney, and Hamilton feared power. They feared power whether exercised by a monarch, an aristocracy, an army, or a majority, and they were one in their determination to write into fundamental law limitations on the arbitrary exercise of that power. To assume, as Beard so commonly does, that the fear of the misuse of power by majorities was either peculiar to the Federalists or more ardent with them than with their opponents, is mistaken. Indeed it was rather the anti-Federalists who were most deeply disturbed by the prospect of majority rule; they, rather than the Federalists, were the "men of little faith." Thus it was John Lansing, Jr., of New York (he who left the Convention rather than have any part in its dangerous work) who said that "all free constitutions are formed with two laws—to deter the governed from crime, and the governors from tyranny." And the ardent Patrick Henry, who led the attack on the Constitution in the Virginia Convention—and almost defeated it—complained not of too little democracy in that document, but too much.

The framers, to be sure, feared the powers of the majority, as they feared all power unless controlled. But they were insistent that, in the last analysis, there must be government by majority; even conservatives like Morris and Hamilton made this clear. Listen to Hamilton, for example, at the very close of the Convention. Elbridge Gerry, an opponent of the Constitution, had asked for a reconsideration of the provision for calling a constitutional convention, alleging that this opened the gate to a majority that could "bind the union to innovations that may subvert the State-Constitutions altogether." To this Hamilton replied that

there was no greater evil in subjecting the people of the U.S. to the major voice of the people of a particular State. . . . It was equally desirable now that an easy mode should be established for supplying defects which will probably appear in the new System. . . . There could be no danger in giving this power, as the people would finally decide in the case.

And on July 13, James Wilson, another staunch Federalist, observed that "The majority of people wherever found ought in all questions to govern the minority."

But we need not rely upon what men said; there is too much of making history by quotation anyway. Let us look rather at what men did. We can turn again to the Constitution itself. Granted the elaborate system of checks and balances: the separation of powers, the bicameral legislature, the executive veto, and so forth—checks found in the state constitutions as well, and in our own democratic era as in the earlier one—what provision did the framers make against majority tyranny? What provisions did they write into the Constitution against what Randolph called "democratic licentiousness"?

They granted equality of representation in the Senate. If this meant that conservative Delaware would have the same representation in the upper chamber as democratic Pennsylvania, it also meant that democratic Rhode Island would have the same representation as conservative South Carolina. But the decision for equality of representation was not dictated by considerations either economic or democratic, but rather by the recalcitrance of the small states. Indeed, though it is difficult to generalize here, on the whole it is true that it was the more ardent Federalists who favored proportional representation in both houses.

They elaborated a most complicated method of electing a Chief Executive, a method designed to prevent the easy expression of any majority will. Again the explanation is not simple. The fact was that the framers did not envision the possibility of direct votes for presidential candidates which would not conform to state lines and interests and thus lead to dissension and confusion. Some method, they thought, must be designated to overcome the force of state prejudices (or merely of parochialism) and get an election; the method they anticipated was a preliminary elimination contest by the electoral college and then eventual election by the House. This, said George Mason, was what would occur nineteen times out of twenty. There is no evidence in the debates that the complicated method finally hit upon for electing a President was designed either to frustrate popular majorities or to protect special economic interests; its purpose was to overcome state pride and particularism.

Senators and Presidents, then, would not be the creatures of democracy. But what guarantee was there that senators would be representatives of property interests, or that the President himself would recognize the "priority of property"? Most states had property qualifications for office holding, but there are none in the Federal Constitution. As far as the Constitution is concerned, the President, congressmen, and Supreme Court justices can all be paupers.

Both General Charles Cotesworth Pinckney and his young cousin Charles, of South Carolina, were worried about this. The latter proposed a property qualification of \$100,000 (a tidy sum in those days) for the Presidency, half that for the judges, and substantial sums for members of Congress. Franklin rebuked him. He was distressed, he said, to hear anything "that tended to debase the spirit of the common people." More surprising was the rebuke from that stout conservative, John Dickinson. "He doubted," Madison reports, "the policy of interweaving into a Republican constitution a veneration for wealth. He had always understood that a veneration for poverty & virtue were the objects of republican encouragement." Pinckney's proposal was overwhelmingly rejected.

What of the members of the lower house? When Randolph opened "the main business" on May 29 he said the remedy for the crisis that men faced must be "the republican principle," and two days later members were

discussing the fourth resolution, which provided for election to the lower house by the people. Roger Sherman of Connecticut thought that "the people should have as little to do as may be about the Government," and Gerry hastened to agree in words now well-worn from enthusiastic quotation that "The evils we experience flow from the excess of democracy." These voices were soon drowned out, however. Mason "argued strongly for an election . . . by the people. It was to be the grand depository of the democratic principle of the Govt." And the learned James Wilson, striking the note to which he was to recur again and again, made clear that he was for "raising the federal pyramid to a considerable altitude, and for that reason wished to give it as broad a basis as possible." He thought that both branches of the legislature—and the President as well, for that matter—should be elected by the people. "The Legislature," he later observed, "ought to be the most exact transcript of the whole Society."

A further observation is unhappily relevant today. It was a maxim with John Adams that "where annual elections end, there tyranny begins," and the whole Revolutionary generation was committed to a frequent return to the source of authority. But the framers put into the Constitution no limits on the number of terms which Presidents or congressmen could serve. It was not that the question was ignored; it received elaborate attention. It was rather that the generation that wrote the Constitution was better grounded in political principles than is our own; that it did not confuse, as we so often do, quantitative and qualitative limitations; and that—in a curious way—it had more confidence in the intelligence and the good will of the people than we seem to have today. It is, in any event, our own generation that has the dubious distinction of writing into the Constitution the first quantitative limitation on the right of the majority to choose their President. It is not the generation of the framers that was undemocratic; it is our generation that is undemocratic.

It is relevant to note, too, that the Constitution contains no property qualification for voting. Most states, to be sure, had such qualifications—in general a freehold or its equivalent—and the Constitution assimilated such qualifications as states might establish. Yet the framers, whether for reasons practical or philosophical we need not determine, made no serious efforts to write any property qualifications for voting into the Constitution itself.

The question of popular control came up clearly in one other connection as well: the matter of ratification. Should the Constitution be ratified by state legislatures, or by conventions? The practical arguments for the two methods were nicely balanced. The decisive argument was not, however, one of expediency but of principle. "To the people with whom all power remains that has not been given up in the Constitutions derived from them" we must resort, said Mason. Madison put the matter on principle, too. "He considered the difference between a system founded on the Legislatures only, and one founded on the people, to be the true difference between a *league*

or treaty and a Constitution." Ellsworth's motion to refer the Constitution to legislatures was defeated by a vote of eight to two, and the resolution to refer it to conventions passed with only Delaware in the negative.

Was the Constitution designed to place private property beyond the reach of majorities? If so, the framers did a very bad job. They failed to write into it the most elementary safeguards for property. They failed to write into it limitations on the tax power, or prohibitions against the abuse of the money power. They failed to provide for rule by those whom Adams was later to call the wise and the rich and the well-born. What they did succeed in doing was to create a system of checks and balances and adjustments and accommodations that would effectively prevent the suppression of most minorities by majorities. They took advantage of the complexity, the diversity, the pluralism, of American society and economy to encourage a balance of interests. They worked out sound and lasting political solutions to the problems of class, interest, section, race, religion, party.

Perhaps the most perspicacious comment on this whole question of the threat from turbulent popular majorities against property and order came, *mirabile dictu*, from the dashing young Charles Pinckney of South Carolina—he of the "lost" Pinckney Plan. On June 25 Pinckney made a major speech and thought it important enough to write out and give to Madison. The point of departure was the hackneyed one of the character of the second branch of the legislature, but the comments were an anticipation of De Tocqueville and Lord Bryce. We need not, Pinckney asserted, fear the rise of class conflicts in America, nor take precautions against them.

The genius of the people, their mediocrity of situation & the prospects which are afforded their industry in a Country which must be a new one for centuries are unfavorable to the rapid distinction of ranks. . . . If equality is . . . the leading feature of the U. States [he asked], where then are the riches & wealth whose representation & protection is the peculiar province of this permanent body [the Senate]. Are they in the hands of the few who may be called rich; in the possession of less than a hundred citizens? certainly not. They are in the great body of the people [There was no likelihood that a privileged body would ever develop in the United States, he added, either from the landed interest, the moneyed interest, or the mercantile.] Besides, Sir, I apprehend that on this point the policy of the U. States has been much mistaken. We have unwisely considered ourselves as the inhabitants of an old instead of a new country. We have adopted the maxims of a State full of people The people of this country are not only very different from the inhabitants of any State we are acquainted with in the modern world; but I assert that their situation is distinct from either the people of Greece or of Rome Our true situation appears to me to be this—a new extensive Country containing within itself the materials for forming a Government capable of extending

to its citizens all the blessings of civil & religious liberty—capable of making them happy at home. This is the great end of Republican Establishments. . . .

Not a government cunningly contrived to protect the interests of property, but one capable of extending to its citizens the blessings of liberty and happiness—was that not, after all, what the framers created?